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OPINION OF THE FIFTH CIRCUIT (SEPTEMBER 5, 2018)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW; HEIGHTS AUTOHAUS,

Plaintiffs-Appellees,

v.

HOUSTON AUTO M. IMPORTS GREENWAY, LIMITED, doing business as Mercedes-Benz of Houston Greenway,

Defendant-Appellant.

No. 17-20680

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CV-574

Before: KING, ELROD, and HAYNES, Circuit Judges.

PER CURIAM[1]

[1] Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

This is the third appeal in this case and the second appeal on the attorneys' fees award. Zastrow originally brought RICO claims and retaliation claims under 42 U.S.C. §§ 1981 and 1982. *Zastrow v. Hous. Auto Imports Greenway Ltd.*, 789 F.3d 553, 557 (5th Cir. 2015). The district court granted summary judgment to Houston Auto M. Imports, Ltd. d/b/a Mercedes-Benz of Houston Greenway, and in the first appeal, we affirmed except as to the summary judgment on the § 1981 claims, which we vacated and remanded. *Id.* In the second appeal, Mercedes Greenway appealed the district court's award of $939.29 in damages and $110,000 in attorneys' fees on the § 1981 claims. *Zastrow v. Hous. Auto M. Imports Greenway, Ltd.*, 695 F. App'x 774, 777 (5th Cir. 2017). We affirmed the judgment on liability but held that the district court's attorneys' fees calculation was inadequate because it failed to consider "Zastrow's degree of success." *Id.* at 776, 779. We vacated the award and remanded the case with the instruction that: "we leave it to the district court to determine what impact, if any, Zastrow's degree of success has on its award of attorneys' fees." *Id.* at 779.

On remand, the district court left intact its prior award and added to it the attorneys' fees expended on the appeal. The district court made findings explaining its award as follows: "The court concludes that the reputation of the attorneys representing the plaintiff is above reproach and, coupled with his experience and skills and the plaintiffs' degree of success." While a more robust explanation than the one given would have been preferable and advisable, we nevertheless hold that there is no reversible error here. AFFIRMED.

JUDGMENT OF THE FIFTH CIRCUIT (SEPTEMBER 5, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW; HEIGHTS AUTOHAUS,

Plaintiffs-Appellees,

v.

HOUSTON AUTO M. IMPORTS GREENWAY, LIMITED, doing business as Mercedes-Benz of Houston Greenway,

Defendant-Appellant.

No. 17-20680

Appeals from the United States District Court
for the Southern District of Texas
D.C. Docket No. 4:13-CV-574

Before: KING, ELROD, and HAYNES, Circuit Judges.

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

THIRD FINAL JUDGMENT (OCTOBER 2, 2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL.,

Plaintiffs,

v.

HOUSTON AUTO M. IMPORTS GREENWAY LTD. d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL.,

Defendants.

Civil Action No. 4:13-CV-574

Before: Kenneth M. HOYT,
United States District Judge

On March 7, 2016, the trial of this case began. The plaintiff, Mark Zastrow, appeared individually and as the representative of Heights Autohaus, and through his attorney and announced ready for trial. The defendant, Houston Auto M. Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway, appeared in person through its representative, Mike Yale, and through its attorney and announced ready for trial. The Court determines that it had jurisdiction over the subject matter and the parties in this case

and impaneled a jury that heard the evidence and arguments of counsel. Thereafter, the Court submitted the case to the jury on questions, definitions, and instructions. In response, the jury made findings that the Court received, filed, and entered into the record. *See* [Dkt. No. 201].

Now the plaintiffs, Mark Zastrow and Heights Autohaus move for entry of judgment on the verdict. The Court has considered the motion and finding the motion meritorious enters judgment for the plaintiffs, Mark Zastrow and Heights Autohaus and enters judgment as follows:

a) The Court orders that the plaintiffs, Mark Zastrow and Heights Autohaus, recover the sum of $939.29, plus attorney fees and costs, from the defendant, Houston Auto Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway for violation of 42 U.S.C. § 1981;

b) The plaintiffs, Mark Zastrow and Heights Autohaus, requested attorney fees and costs in a motion with supporting affidavits under 42 U.S.C. § 1988(b). The Court examined the record, determines that the request is supported by law, and taking judicial notice of the usual and customary attorney fees, and considering the case, determines a reasonable attorney fee to be $117,000.00. The Court has entered an Order ordering the defendant, Houston Auto M. Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway to pay to plaintiffs, Mark Zastrow and Heights Autohaus, for their attorney's fee a total of $117,000;

c) The plaintiffs, Mark Zastrow and Heights Autohaus, as prevailing parties are entitled to recover taxable costs incurred in litigating this dispute. Fed. R. Civ. P. 54(d)(1). Pursuant to Local Rules Texas (S.D.), Rule 54.2. The plaintiffs filed a bill of costs, supported by previously filed affidavits and exhibits, concurrently with their motion for attorney fees. The bill of costs includes costs allowed by law under 28 U.S.C. § 1920. The Court examined the record, determines that the request is supported by law, and awards taxable costs of $3,309.57 against the defendant. Houston Auto M. Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway;

d) The Court awards prejudgment interest on the sum at the annual rate of 3%, compounded annually, to be paid from January 9, 2013, until the date of the entry of this judgment;

e) Finally, the Court awards post-judgment interest on all of the above amounts allowable by law at the rate of 1.23% from the date this judgment until the judgment is paid.

This is a FINAL JUDGMENT.

SIGNED on this 29th day of September, 2017.

/s/ Kenneth M. Hoyt
United States District Judge

ORDER ON PLAINTIFFS' MOTION FOR ATTORNEY FEE (SEPTEMBER 29, 2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL.,

Plaintiffs,

v.

HOUSTON AUTO M. IMPORTS GREENWAY LTD. d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL.,

Defendants.

Civil Action No. 4:13-CV-574

Before: Kenneth M. HOYT, United States District Judge

Before the Court are the plaintiffs' motion for attorneys' fee and costs of court (Dkt. No. 244). The Court has reviewed the parties' positions with a view toward: (a) the time and labor required for this litigation; (b) the novelty and difficulty of the issues; (c) the level of skill required to prepare and present the case; (d) the usual and/or customary rate for such services; (e) the experience, reputation and ability of the attorneys; (f) the amount that counsel of similar abilities are awarded

and/or bill for similar cases; and (g) the plaintiffs' degree of success. *See Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

The plaintiff initiated this suit against the defendant based on allegations of discrimination under 42 U.S.C. § 1981. A jury heard the evidence, found for the plaintiff and awarded actual, compensatory damages. The Court is of the opinion that the plaintiff is entitled to recover attorney's fee pursuant to 42 U.S.C. § 1988(b).

A review of the motion reveals that: (a) the time expended by the plaintiff's attorney is reasonable requiring significant time and labor; (b) the hourly rate and range of fees charged by the plaintiff's attorneys compares favorably to charges by attorneys of similar skills and experience fall within the prevailing market rates in Houston; (c) the litigation was complex and of the type that attorneys' typically do not undertake. Also, in this case, the plaintiff was required to perfect one appeal and prevail and successfully defend the jury's verdict in a second appeal.

The Court concludes that the reputation of the attorneys representing the plaintiff is above reproach and, coupled with his experience and skills and the plaintiffs' degree of success.

The Court, therefore, awards counsel attorney's fees of $117,000.00 which includes $7,000.00 in light of the second appeal.

It is so ORDERED.

SIGNED on this 29th day of September, 2017.

/s/ Kenneth M. Hoyt
United States District Judge

OPINION OF THE FIFTH CIRCUIT (JUNE 21, 2017)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW; HEIGHTS AUTOHAUS,

Plaintiffs-Appellees,

v.

HOUSTON AUTO M. IMPORTS GREENWAY, LIMITED, doing business as Mercedes-Benz of Houston Greenway,

Defendant-Appellant.

No. 16-20258

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CV-574

Before: STEWART, Chief Judge, and JOLLY and WIENER, Circuit Judges.

PER CURIAM*

A jury found that Defendant-Appellant, Houston Auto M. Imports, Ltd. d/b/a Mercedes-Benz of Houston

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Greenway ("Mercedes Greenway"), retaliated against Plaintiffs-Appellees Mark Zastrow and his company, Heights Autohaus (collectively "Zastrow") in violation of 42 U.S.C. § 1981. For the following reasons, we AFFIRM the jury's verdict; however, we VACATE and REMAND the award of attorneys' fees and REVERSE the award of certain costs.

I. Factual History

Mark Zastrow owns Heights Autohaus, a car repair business that specializes in German vehicles. Prior to the events underlying this lawsuit, Zastrow purchased Mercedes-Benz parts at a discount from Mercedes Greenway. In 2012, one of Zastrow's clients and his attorney in this suit, Reginald McKamie, Sr., requested that Zastrow inspect the vehicle of Jessee Howard and JoAnn Jefferson-Howard (the "Howards"). The Howards were involved in arbitration with Mercedes Greenway. The Howards had alleged that the vehicle Mercedes Greenway sold to them was defective and had brought claims for fraud, negligence, breach of contract, breach of warranty, breach of fiduciary duty, credit discrimination, and racial discrimination and retaliation. Zastrow did not know the nature of the Howards' claims when he performed his inspection.

Zastrow's inspection revealed a number of mechanical problems with the vehicle, and he agreed to testify as an expert witness on the Howards' behalf. The day before Zastrow was to be deposed, he alleges that a Mercedes Greenway employee called him and told him not to testify, warning that he would regret it. The employee denies that this call took place. Zastrow nonetheless testified at the deposition. He discussed several problems with the vehicle and opined that those

problems were present when the vehicle was sold. He was also highly critical of the work done by Mercedes Greenway and accused them of "throwing parts" at the vehicle. The day after the deposition, the same Mercedes Greenway employee called Zastrow and informed him that the company would no longer sell parts to him. The next week, Zastrow received a letter stating "[p]ursuant to your expert testimony in the [Howards' case], this correspondence will serve as notice that Mercedes-Benz of Houston

Greenway is terminating their relationship with Heights Autohaus, effective immediately."

II. Procedural History

In March of 2013, Zastrow filed a lawsuit against Mercedes Greenway and its attorneys bringing RICO claims and retaliation claims under 42 U.S.C. §§ 1981 and 1982. The district court granted summary judgment on all claims in favor of Mercedes Greenway. On appeal, this court upheld the district court's grant of summary judgment on all but Zastrow's § 1981 claim. *See Zastrow v. Hous. Auto Imps. Greenway Ltd.*, 789 F.3d 553, 565 (5th Cir. 2015). We held that "[b]ecause Zastrow's testimony supported the Howards' § 1981 claim," his testimony was "protected under the statute." *Id.* at 563. However, we remanded the § 1981 claim for the district court to consider under the *McDonnell Douglas*[1] burden-shifting framework. *Id.* at 565.

On remand, the district court severed Mercedes Greenway's attorneys from this action. Zastrow then

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1 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

proceeded to trial on his § 1981 claim. The jury found that Mercedes Greenway retaliated against Zastrow in response to his testimony in support of the Howards' § 1981 claim and awarded him $939.29 in damages. The district court awarded Zastrow $110,000 in attorneys' fees and $5,837.67 in costs. Mercedes Greenway brought a renewed motion for judgment as a matter of law ("JMOL"), which the district court denied. This appeal followed.

III. Discussion

Mercedes Greenway alleges that the district court erred by denying its renewed JMOL. Additionally, it claims that the district court erred in its calculation of attorneys' fees and in assessing costs that were either unrecoverable or inadequately supported. We address each issue in turn.

A. JMOL

Mercedes Greenway raises two arguments as to why the district court should have granted its JMOL motion. First, it claims that Zastrow failed to prove a prima facie case of discrimination because he lacked a "reasonable belief" that he was testifying in support of a racial discrimination claim. Second, it challenges the sufficiency of the evidence Zastrow presentenced that Mercedes Greenway's legitimate, non-retaliatory reason for ending the parties' business relationship was pretext for retaliation.

We review a properly preserved JMOL motion de novo. *Montano v. Orange Cty.*, 842 F.3d 865, 873 (5th Cir. 2016). This court grants a JMOL only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."

FED R. CIV. P. 50(a)(1); *see also McClaren v. Morrision Mgmt. Specialists, Inc.*, 420 F.3d 457, 461 (5th Cir. 2005). We give "special deference" to a jury's verdict when reviewing a JMOL. *Id.*

"A party may move for JMOL after the nonmovant 'has been fully heard on an issue during a jury trial.'" *Montano*, 842 F.3d at 873 (quoting FED. R. CIV. P. 50(a)). If the Rule 50(a) motion is denied, a party can renew the motion after trial under Rule 50(b). *Id.* An issue denied in a Rule 50(a) motion must be raised again in a Rule 50(b) motion to preserve it for review. *See OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 680 (5th Cir. 2016) ("[W]e lack power to address a claim not properly raised in a Rule 50(b) motion."); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006) ("[T]he precise subject matter of a party's Rule 50(a) motion—namely, its entitlement to judgment as a matter of law—cannot be appealed unless that motion is renewed pursuant to Rule 50(b).").

We review Zastrow's retaliation claim under the three-part *McDonnell Douglas* framework. *Zastrow*, 789 F.3d at 564 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). First, Zastrow must establish a prima facie case by showing "(1) he engaged in activity protected by § 1981; (2) he was subjected to an adverse action; and (3) a causal link exists between the protected activity and the adverse action." *Id.* Then, "the burden shifts to [Mercedes Greenway] to proffer a legitimate, non-retaliatory reason for the adverse action." *Id.* Finally, "if [Mercedes Greenway] provides such an explanation, the burden returns to [Zastrow] to show that the proffered reason was pretext for retaliation." *Id.*

Mercedes Greenway first argues that Zastrow failed to present a prima facie case that he participated in protected activity because he was unaware that he was testifying in support of the Howards' civil rights claim at the time of his deposition. However, its renewed JMOL challenges only whether Zastrow submitted sufficient evidence to show pretext. Therefore, this issue is not properly before the court, and we decline to address it.[2] *See OneBeacon Ins.*, 841 F.3d at 680.

Next, Mercedes Greenway avers that Zastrow failed to meet his burden of showing that its proffered non-discriminatory reason for terminating its relationship with Zastrow was pretextual. We disagree. In the previous iteration of this case, we held that "a company's refusal to contract with someone who has criticized its business and impugned its reputation is not illegal retaliation—so long as that refusal is not a reprisal for . . . an attempt to support the [racial discrimination] complaint of another." *Zastrow*, 789 F.3d at 564. Having concluded that Mercedes Greenway met its burden to present a legitimate, non-retaliatory reason for its action, the burden shifted to Zastrow to show that Mercedes Greenway actually terminated the relationship because his testimony supported the

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[2] Moreover, it is not clear that this argument was sufficiently presented to the district court in the Rule 50(a) motion. A party may not advance an argument in its Rule 50(b) motion that was not raised in its Rule 50(a) motion. *In re Isbell Records, Inc.*, 774 F.3d 859, 867 (5th Cir. 2014). A Rule 50(a) "motion must specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). In its Rule 50(a) motion, however, Mercedes Greenway simply made a bare assertion that Zastrow "h[ad] not established a prima facie case of wrongful retaliation."

Howards' discrimination claims. *Id.* "In other words, he [must] show that, but for his testimony's relevance to the Howards' discrimination claims . . . the dealership would not have stopped selling him parts." *Id.*

Viewing all evidence in the light most favorable to Zastrow, we conclude that a reasonable jury could have found pretext based on the evidence presented. *See* Fed. R. Civ. P. 50(a); *OneBeacon Ins.*, 841 F.3d at 675-76. Although Mercedes Greenway claims that it decided to sever business ties after Zastrow's testimony criticized and disparaged its business, Zastrow testified that he received a phone call warning him not to testify before the deposition or he would face repercussions. Mercedes Greenway disputes this claim, but it is the job of the factfinder, not the court, "to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *OneBeacon Ins.*, 841 F.3d at 676 (quoting *Roman v. W. Mfg., Inc.*, 691 F.3d 686, 692 (5th Cir. 2012)). This phone call evidences pretext because it tends to show that Mercedes Greenway tried to prevent Zastrow from testifying in support of the Howards' claims before any disparaging remarks were made. Moreover, the letter of termination stated that Mercedes Greenway would no longer sell Zastrow parts "[p]ursuant to [his] expert testimony." Thus, Mercedes Greenway's own statement directly ties its decision to Zastrow's expert testimony. It does not mention disparaging comments or damage to its reputation. As previously held, Zastrow's expert testimony was protected under 42 U.S.C. § 1981 to the extent it supported the Howards' discrimination claim. *Zastrow*, 789 F.3d at 563. Finally, Mercedes Greenway's representative admitted that no one was exposed to Zastrow's testimony other than the parties to the

Howards' arbitration, which undercuts Mercedes Greenway's purported concern about damage to its reputation. Because a reasonable jury could have concluded that Mercedes Greenway's stated reasons for severing its relationship with Zastrow were pretextual, we uphold the district court's denial of the JMOL. *See* Fed. R. Civ. P. 50(a)(1).

B. Attorneys' Fees

A prevailing party in a 42 U.S.C. § 1981 case may receive attorneys' fees. 42 U.S.C. § 1988(b). We review the award of attorneys' fees under § 1988 for abuse of discretion. *Dearmore v. City of Garland*, 519 F.3d 517, 520 (5th Cir. 2008).

Mercedes Greenway insists that the district court erred in awarding attorneys' fees because it failed to consider Zastrow's degree of success. We agree. District courts in this circuit "apply a two-step method for determining a reasonable attorney's fee award." *Combs v. City of Huntington*, 829 F.3d 388, 391 (5th Cir. 2016). First, the court calculates the lodestar, "which is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work." *Id.* at 392 (quoting *Jimenez v. Wood Cty.*, 621 F.3d 372, 379 (5th Cir. 2010), *on reh'g en banc*, 660 F.3d 841 (5th Cir. 2011)). Second, the district court should consider the twelve *Johnson* factors. *Id.* at 391-92 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989)). Importantly, "courts must consider the plaintiff's degree of success to determine whether the lodestar is excessive." *Id.* at 394; *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (stating

that "the degree of success obtained" is the "most critical factor" in determining a reasonable fee).

In this case, Zastrow requested $108,000 in economic damages and $1.08 million in punitive damages. The jury awarded only $939.29 in economic damages, and he did not obtain any injunctive relief. This is not to say that Zastrow's relief is only nominal. *See Farrar v. Hobby*, 506 U.S. 103, 115-16 (1992) (stating that "[a] plaintiff who seeks compensatory damages but receives no more than nominal damages" may deserve no fee under § 1988). He received actual, compensatory damages and obtained a jury finding that Mercedes Greenway retaliated against him. Although the district court calculated the lodestar amount and considered several of the *Johnson* factors when awarding attorneys' fees, it failed to consider Zastrow's degree of success. Because it was legal error not to account for the degree of success, we vacate and remand the attorneys' fees award for the district court to reconsider in light of this critical factor. *See Combs*, 829 F.3d at 394; *Frew v. Traylor*, No. 14-41232, 2017 WL 1520865, ___F.App'x ___, at *6 (5th Cir. Apr. 27, 2017) (vacating and remanding where the district court failed to consider the degree of success obtained when calculating attorneys' fees).

On remand, we note that "[t]he district court has broad discretion to award attorney's fees under § 1988 (b)." *Dearmore*, 519 F.3d at 520. Thus, we leave it to the district court to determine what impact, if any, Zastrow's degree of success has on its award of attorneys' fees.

C. Costs

Finally, Mercedes Greenway claims that the district court erred in awarding certain costs. Specifically, it challenges $98.10 in Public Access to Court Electronic Records ("PACER") fees, $1,965.00 in costs for video setup and playback at trial, and $465.00 for private service of process.

We review an award of costs for abuse of discretion. *Pacheco v. Mineta*, 448 F.3d 783, 793 (5th Cir. 2006). The district court should ordinarily allow recovery of costs to the prevailing party. *See* 28 U.S.C. § 1920 (setting out what costs a prevailing party may recover); Fed. R. Civ. P. 54(d).

This circuit has not determined whether PACER fees are recoverable under Rule 54(d) and § 1920. *See Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1045 (5th Cir. 2010). District courts are split on whether PACER fees are recoverable always, never, or only in certain circumstances. *See Giner v. Estate of Higgins*, No. 11-CV-126, 2012 WL 2397440, at *5 (W.D. Tex. June 22, 2012) (collecting cases). However, we need not decide this issue because the record does not reveal on what basis the PACER charges were incurred, be it electronic legal research, filing, or "making copies . . . necessarily obtained for use in the case." 28 U.S.C. § 1920(4); *see also Giner*, 2012 WL 2397440 at *5. Since the rationale behind the award of PACER fees is unclear, we vacate the award of PACER fees and remand for additional consideration by the district court. *See Gagnon*, 607 F.3d at 1045.

Further, we hold that the district court erred in awarding costs for video setup and playback and for private process servers. While fees for video depositions

for use at trial are recoverable under § 1920(2), nothing in the statute authorizes the taxation of costs for video setup and playback at trial. *See Morrison v. Reichhold Chems., Inc.*, 97 F.3d 460, 465-66 (11th Cir. 1996) (reversing a district court's award of costs "for playback of video depositions at trial"); *cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S.Ct. 1997, 2006 (2012) (cautioning that taxable expenses are narrow in scope and "are limited to relatively minor, incidental expenses"). Finally, this circuit has held that costs for private process servers are not recoverable, absent exceptional circumstances. *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 257 (5th Cir. 1997); *accord Marmillion v. Am. Int'l Ins. Co.*, 381 F. App'x 421, 431 (5th Cir. 2010). Zastrow failed to make such a showing.

Therefore, we vacate and remand the award of $98.10 for PACER expenses, and we reverse costs totaling $2,430.00 for video playback and private process servers.

IV. Conclusion

For the foregoing reasons, we AFFIRM the jury's verdict. We VACATE and REMAND the award of attorneys' fees and PACER costs for reconsideration consistent with this opinion. We REVERSE the award of costs for video playback and service of process.

JUDGMENT OF THE FIFTH CIRCUIT (JUNE 21, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW; HEIGHTS AUTOHAUS,

Plaintiffs-Appellees,

v.

HOUSTON AUTO M. IMPORTS GREENWAY, LIMITED, doing business as Mercedes-Benz of Houston Greenway,

Defendant-Appellant.

No. 16-20258

Appeals from the United States District Court for the Southern District of Texas, Houston

Before: STEWART, Chief Judge, and JOLLY and WIENER, Circuit Judges.

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that we affirm the jury's verdict. We vacate and remand the award of attorney's fees and pacer costs for reconsideration consistent with the opinion of this Court. We reverse the award of costs for video playback and service of process.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ORDER AWARDING ATTORNEYS' FEES (APRIL 7, 2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL.,

Plaintiffs,

v.

HOUSTON AUTO M. IMPORTS GREENWAY LTD. d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL.,

Defendants.

Civil Action No. 4:13-CV-0574

Before: Kenneth M. HOYT,
United States District Judge

Before the Court are the plaintiffs' motion for attorneys' fee and costs of court. The Court has reviewed the parties' positions with a view toward: (a) the time and labor required for this litigation; (b) the novelty and difficulty of the issues; (c) the level of skill required to prepare and present the case; (d) the usual and/or customary rate for such services; (e) the experience, reputation and ability of the attorneys; (f) the amount that counsel of similar abilities are awarded

See Johnson v. Georgia Highway Express, 488 F.2d 714) (5th Cir. 1974).

The plaintiff initiated this suit against the defendant based on allegations of discrimination under 42 U.S.C. § 1981. A jury heard the evidence, found for the plaintiff and awarded nominal damages. The Court is of the opinion that the plaintiff is entitled to recover attorneys' fee pursuant to 42 U.S.C. § 1988(b).

A review of the motion reveals that: (a) the time expended by the plaintiff's attorneys is reasonable requiring significant time and labor; (b) the hourly rate and range of fees charged by s by attorneys of similar skills and experience fall within the prevailing market rates in Houston; (c) the litigation was complex and of the type do not undertake. Also, in this case, the plaintiff was required to perfect an appeal and prevail.

The Court concludes that the reputation of the attorneys representing the plaintiff is above approach and, coupled with his experience and skills, he/they should be awarded fees as follows: Mr. McKamie 250 hours at $300.00 per hour; Mr. Eutsler 200 hours at $175 per hour for a total of $110,000.

The Court, therefore, awards counsel attorney's fees of $110,000.

It is so Ordered.

SIGNED on this 7th day of April, 2016.

/s/ Kenneth M. Hoyt
United States District Judge

SECOND FINAL JUDGMENT (APRIL 7, 2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL.,

Plaintiffs,

v.

HOUSTON AUTO M. IMPORTS GREENWAY LTD. d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL.,

Defendants.

Civil Action No. 4:13-CV-574

Before: Kenneth M. HOYT, United States District Judge

On March 7, 2016, the trial of this case began. The plaintiff, Mark Zastrow, appeared individually and as the representative of Heights Autohaus, and through his attorney and announced ready for trial. The defendant, Houston Auto M. Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway, appeared in person through its representative, Mike Yale, and through its attorney and announced ready for trial. The Court determines that it had jurisdiction over the subject matter and the parties in this case

and impaneled a jury that heard the evidence and arguments of counsel. Thereafter, the Court submitted the case to the jury on questions, definitions, and instructions. In response, the jury made findings that the Court received, filed, and entered into the record. *See* [Dkt. No. 201].

Now the plaintiffs, Mark Zastrow and Heights Autohaus move for entry of judgment on the verdict. The Court has considered the motion and finding the motion meritorious enters judgment for the plaintiffs, Mark Zastrow and Heights Autohaus and enters judgment as follows:

(a) The Court orders that the plaintiffs, Mark Zastrow and Heights Autohaus, recover the sum of $939.29, plus attorney fees and costs, from the defendant, Houston Auto Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway for violation of 42 U.S.C. § 1981;

(b) The plaintiffs, Mark Zastrow and Heights Autohaus, requested attorney fees and costs in a motion with supporting affidavits under 42 U.S.C. § 1988(b). The Court examined the record, determines that the request is supported by law, and taking judicial notice of the usual and customary attorney fees, determines a reasonable attorney fees to be $110,000. The Court has entered an Order ordering the defendant, Houston Auto M. Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway to pay to plaintiffs, Mark Zastrow and Heights Autohaus, total of $110,000;

(c) The plaintiffs, Mark Zastrow and Heights Autohaus, as prevailing parties are entitled to recover taxable costs incurred in litigating this dispute. Fed. R. Civ. P. 54(d)(1). Pursuant to Local Rules Texas (S.D.), Rule 54.2. The plaintiffs filed a bill of costs, with supporting affidavits and exhibits, concurrently with their motion for attorney fees. The bill of costs includes costs allowed by law under 28 U.S.C. § 1920. The Court examined the record, determines that the request is supported by law, and awards taxable costs of $5,837.67 against the defendant. Houston Auto M. Imports Greenway, Ltd. d/b/a Mercedes-Benz of Houston Greenway;

(d) The Court awards prejudgment interest on the sum at the annual rate of 3%, compounded annually, to be paid from January 9, 2013, until the date of the entry of this judgment;

(e) Finally, the Court awards post-judgment interest on all of the above amounts allowable by law at the rate of 0.67% from the date this judgment until the judgment is paid.

This is a FINAL JUDGMENT.

SIGNED on this 7th day of April, 2016.

/s/ Kenneth M. Hoyt
United States District Judge

OPINION OF THE FIFTH CIRCUIT (JUNE 12, 2015)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW; HEIGHTS AUTOHAUS,

Plaintiffs-Appellants,

v.

HOUSTON AUTO IMPORTS GREENWAY LIMITED., doing business as Mercedes-Benz of Houston Greenway; GEORGE A. KURISKY, JR.; JOHNSON DELUCA KURISKY; GOULD, P.C.,

Defendants-Appellees.

No. 14-20359

Appeals from the United States District Court for the Southern District of Texas

Before: CLEMENT, PRADO, and ELROD, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiffs-Appellants Mark Zastrow and his company Heights Autohaus (collectively, "Zastrow") appeal from the district court's grant of summary judgment on their claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and 42 U.S.C. §§ 1981 and 1982. For the reasons

to be explained, we AFFIRM the district court's judgment on Zastrow's civil RICO claim and § 1982 claim, but VACATE its judgment on Zastrow's retaliation claim under § 1981 and REMAND the case for further proceedings consistent with this opinion.

I.

Zastrow owns Heights Autohaus, an automobile repair shop that performs mechanical repairs on German cars. Zastrow previously purchased all of his Mercedes-Benz parts from Houston Auto M. Imports, Ltd. d/b/a Mercedes-Benz of Houston Greenway ("Mercedes Greenway") at a 25% discount. In September of 2012, Zastrow's customer and attorney in this action, Reginald E. McKamie, Sr., brought Zastrow a 2006 Mercedes-Benz CLK ("CLK") to inspect. Unbeknownst to Zastrow at the time, the vehicle was the subject of a lawsuit against Mercedes Greenway that had been compelled to arbitration. The plaintiffs in that suit, Jesse Howard and JoAnn Jefferson-Howard (collectively, the "Howards"), also represented by McKamie, alleged that the CLK that Mercedes Greenway sold them was defective, and asserted claims against the dealership for fraud, negligence, breach of contract, breach of warranty, breach of fiduciary duty, credit discrimination, and racial discrimination and retaliation.

Zastrow inspected the CLK and discovered a number of mechanical problems with the vehicle. McKamie then asked Zastrow if he would testify as an expert witness in the Howards' lawsuit and Zastrow agreed. Zastrow's deposition was scheduled for January 8, 2013. Zastrow alleges that on January 7, 2013, he received a phone call from a Mercedes Greenway

employee advising him not to sit for the deposition and warning him that he would regret it. Zastrow, however, appeared for the deposition and testified about his inspection of the vehicle. On January 9, 2013, the day after his deposition, Zastrow received a phone call from the same Mercedes Greenway employee, who then informed Zastrow that Mercedes Greenway would no longer sell parts to him.

The final arbitration hearing began the following week on January 14 and concluded on January 17, 2013. On January 14, Mercedes Greenway's counsel, George A. Kurisky, Jr., mailed Zastrow a letter on behalf of Mercedes Greenway formally severing the dealership's business relationship with Zastrow because of his deposition testimony.[1] Zastrow did not testify at the arbitration hearing and was unaware it was taking place. His deposition testimony, however, was read to the arbitrator.

On January 23, 2013, McKamie sent the arbitrator a letter captioned "Notice of Retaliation Against Witness in Discrimination Suit and Intent to Sue." On March 4, 2013, Zastrow filed the instant lawsuit naming as defendants Mercedes Greenway, Kurisky, and Kurisky's law firm, Johnson, Deluca, Kurisky & Gould, P.C. Although Zastrow propounds a potpourri of legal theories, the gravamen of his complaint is that Mercedes Greenway threatened him to prevent him from testifying and then, with the assistance of

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[1] The letter from Kurisky stated, in relevant part: "Pursuant to your expert testimony in the above-referenced matter, this correspondence will serve as notice that Mercedes-Benz of Houston Greenway is terminating their relationship with Heights Autohaus, effective immediately."

Kurisky, retaliated against him by refusing to sell him auto parts after he gave his deposition. The district court granted summary judgment to defendants on all claims, and Zastrow appealed the judgment as to his claims under RICO and 42 U.S.C. §§ 1981 and 1982.

II.

We review a district court's grant of summary judgment de novo, applying the same legal standard as the district court. *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 853 (5th Cir. 2003) (per curiam). Summary judgment is appropriate only if, interpreting all facts and drawing all reasonable inferences in favor of the non-moving party, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Where a summary judgment motion mounts challenges solely to the sufficiency of a plaintiff's pleadings, we review those challenges under a motion to dismiss standard. *Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993). Under this standard, "[t]he plaintiff must plead enough facts to state a claim to relief that is plausible on its face." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012) (internal quotation marks omitted). "We accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id.* (alteration and internal quotation marks omitted).

III.

Zastrow first argues that the district court erred in granting summary judgment to defendants on his

civil RICO claim. A civil plaintiff has standing to sue under RICO if he has been "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Zastrow brought his claim under § 1962(c), which we have distilled to mean that "a person who is employed by or associated with an enterprise cannot conduct the enterprise's affairs through a pattern of racketeering." *In re Burzynski*, 989 F.2d 733, 741 (5th Cir. 1993) (per curiam).[2] To succeed on his claim, Zastrow must provide evidence of the existence of "1) a person who engages in 2) a pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Id.* (internal quotation marks omitted).

"Racketeering activity" means any of the predicate acts specified in § 1961(1). Zastrow alleges that defendants obstructed justice in violation of 18 U.S.C. § 1503 by attempting to intimidate him to prevent him from giving deposition testimony and testifying at the arbitration hearing.[3] As relevant here, that statute makes it a criminal offense to "corruptly or by threats

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[2] Section 1962(c) states: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[3] To the extent that Zastrow also purports to raise an independent claim under 18 U.S.C. § 1503 itself, this claim fails because "§ 1503 is a criminal statute that does not provide for a private cause of action." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1482 (9th Cir. 1997), *overruled in part on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc); *accord Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960).

or force, or by any threatening letter or communication. . . . endeavor[] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503 (a).[4] In support of his claim, Zastrow identifies three purported criminal actions by defendants: (1) the January 7 phone call from Mercedes Greenway warning him not to testify; (2) the January 9 phone call from Mercedes Greenway informing Zastrow that it would no longer sell him auto parts; and (3) the January 14 letter from Kurisky officially ending Mercedes Greenway's business relationship with Zastrow because of his deposition testimony.

A.

Zastrow's claim fails initially because he cannot show the "pattern of racketeering activity" required to prosecute a civil RICO claim. A pattern of racketeering activity "consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *Abraham*

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[4] The government must establish three elements to prove an obstruction of justice violation under § 1503: "(1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice." *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989). An "arbitration is not a judicial proceeding," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985), and thus there is some question as to whether an arbitration compelled by a district court satisfies the first element of § 1503. Because Zastrow's RICO claim fails on other grounds and defendants did not raise this objection, we assume without deciding that the arbitration at issue qualifies as a judicial proceeding under § 1503.

v. Singh, 480 F.3d 351, 355 (5th Cir. 2007) (internal quotation marks omitted).

First, Zastrow has, at best, identified only a single predicate act under § 1503: the January 7 phone call. Although he attempts to squeeze all three of defendants' actions under § 1503, an obstruction of justice statute, it is clear that the phone call and letter terminating Mercedes Greenway's business relationship with Zastrow were not attempts "to obstruct or impede the proceeding," *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989), but, as Zastrow claims in his briefing, "retaliatory in nature." (emphasis added). That is, Mercedes Greenway's termination of dealings with Zastrow cannot be construed as threats to prevent his live testimony in the arbitration hearing because there was no threat of further penalty—the dealership unequivocally terminated its business with Zastrow because of his deposition testimony, it did not make future dealings contingent on his absence at the hearing (or indicate in any way that it would reconsider its decision if Zastrow did not testify).

Witness retaliation is a separate crime covered by 18 U.S.C. § 1513, the violation of which also qualifies as a predicate act under RICO. 18 U.S.C. § 1961(1). Defendants' purported misconduct, however, clearly does not fall under this statute (and Zastrow does not argue that it does). *See* 18 U.S.C. § 1513(a)-(b) (prohibiting killing, causing bodily injury, or damaging the tangible property of another person, or threatening to do so, with the intent to retaliate against a witness); *id.* § 1513(e) (prohibiting the "interference with the lawful employment or livelihood of any person[] for providing to a law enforcement officer any truthful

information relating to the commission or possible commission of any Federal offense"). Thus, even assuming the validity 6 of Zastrow's theory that threatening to sever a voluntary business relationship constitutes obstruction of justice under § 1503,[5] only Mercedes Greenway's initial phone call warning Zastrow not to testify would qualify as a predicate act under RICO.

Moreover, even assuming that the two phone calls and the letter constitute three predicate acts under § 1503, Zastrow would still fail to satisfy the continuity requirement. "To establish continuity, plaintiffs must prove 'continuity of racketeering activity, or its threat.'" *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)). "This may be shown by either a closed period of repeated conduct, or an open-ended period of conduct that 'by its nature projects into the future with a threat of repetition.'" *Id.* (quoting *H.J. Inc.*, 492 U.S. at 241). Continuity over a closed period requires proof of "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242. "Predicate acts extending over a few weeks or months

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[5] Although Zastrow did not allege a violation under 18 U.S.C. § 1512, that statute specifically covers intimidation of a witness. In 1982, Congress concurrently enacted § 1512 and deleted all references to witnesses in § 1503. We have held that in doing so, Congress did not intend that threats against witnesses would fall exclusively under § 1512. *See United States v. Branch*, 850 F.2d 1080, 1082 (5th Cir. 1988); *United States v. Wesley*, 748 F.2d 962, 964 (5th Cir. 1984). Again, because Zastrow's RICO claim fails even assuming that Mercedes Greenway's "threat" would be indictable under § 1503, we need not determine whether the alleged offending phone call would rise to the level of obstruction of justice.

and threatening no future criminal conduct do not satisfy this requirement. . . . " *Id.* Continuity over an open period requires "a threat of continued racketeering activity." *Id.* This may be established where the predicate acts "themselves involve a distinct threat of long-term racketeering activity" or "are part of an ongoing entity's regular way of doing business." *Id.* at 242-43.

The alleged witness intimidation and retaliation were committed within one week and were directed towards, at most, two discrete events: Zastrow's deposition and his possible testimony at the arbitration hearing. "[W]here alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction, a 'pattern of racketeering activity' has not been shown." *Word of Faith*, 90 F.3d at 123. We have held that, where all of the alleged predicate acts took place in the context of defending a lawsuit, the unlawful conduct "did not constitute or threaten long-term criminal activity." *Burzynski*, 989 F.2d at 742-43 (dismissing civil RICO claims because multiple acts of alleged mail and wire fraud were committed in an "otherwise lawful" defense of a lawsuit that was "now over"). As in *Burzynski*, the alleged predicate acts here were committed in the context of Mercedes Greenway's defense of a lawsuit. Zastrow cannot credibly argue that obstructing justice is part of defendants' regular way of doing business or that their purported attempts to intimidate him create a threat of long-term racketeering activity. The entirety of Zastrow's claim is that Mercedes Greenway refused to sell him parts after he served as an expert witness against the dealership in an arbitration. Any argument that Mercedes Greenway's business decision threatens long-

term criminal activity is frivolous. Thus, Zastrow has not shown that defendants' alleged predicate acts amount to or constitute a threat of continuing racketeering activity.

B.

Finally, even if Zastrow had produced evidence of a pattern of racketeering activity, he has not demonstrated the existence of an enterprise. Zastrow argues that he has properly pled an "association-in-fact" enterprise[6] between Mercedes Greenway, Kurisky, and his law firm,[7] and points to the allegation in his complaint that "[defendants] in combination agreed

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6 The RICO statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

7 Zastrow also summarily states that "[Mercedes] Greenway fits the definition of an enterprise on its own." However, § 1962(c) "requires that the RICO person be distinct from the RICO enterprise," *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000), and thus Zastrow could not proceed against the dealership if it alone is the enterprise. To the extent that Zastrow would be content to continue on against Kurisky and his law firm, he would be unable to do so because—in addition to the litany of other reasons described above—they did not "participate in the operation or management of the enterprise." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) ("[W]e hold that 'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' § 1962(c), one must participate in the operation or management of the enterprise itself."); *see RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1051 n.7 (D.C. Cir. 2012) (stating that "[t]he circuit courts of appeals have declined to extend RICO liability under § 1962(c) to an attorney's provision of routine legal services" and listing cases).

to engage in unlawful acts of obstructing, impeding or influencing the due administration of justice by communicating by telephone and later threatening letter to a witness in an arbitration hearing in violation of 18 U.S.C. § 1503." "An enterprise is a group of persons or entities associating together for the common purpose of engaging in a course of conduct." *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003). An association-in-fact enterprise "must have an ongoing organization or be a continuing unit, such that the enterprise has an existence that can be defined apart from the commission of the predicate acts." *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987). Construed generously, Zastrow's complaint alleges an enterprise created by the alleged racketeering activity itself. This is obviously not sufficient to plead the existence of an enterprise "separate and apart from the pattern of racketeering activity in which it engages." *Whelan*, 319 F.3d at 229. The district court properly granted summary judgment on Zastrow's breach of contract claim dressed in civil RICO garb.

IV.

Zastrow also appeals the district court's grant of summary judgment to defendants on his claims under §§ 1981 and 1982.[8] Section 1981 prohibits racial dis-

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[8] The district court also granted summary judgment on Zastrow's Title VII retaliation claim. Because he has not briefed the issue, it is waived. *Atwood v. Union Carbide Corp.*, 847 F.2d 278, 280-81 (5th Cir. 1988) (per curiam). In any case, it should be obvious that Zastrow has no Title VII claim because neither he nor the plaintiffs in the underlying arbitration were employees of Mercedes Greenway and there were no Title VII proceedings.

crimination in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981. Section 1981 also prohibits retaliation against an individual who "has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452 (2008). Section 1982 offers the same protection for "rights related to the ownership of property," *id.* at 446, and is not relevant here.

Zastrow argues that his testimony regarding the condition of the CLK was necessary to prove the Howards' claims that Mercedes Greenway sold them a defective vehicle because of their race and in retaliation for complaining about discriminatory treatment, and thus that he was helping the Howards secure their § 1981 rights.[9] The district court held that Zastrow's testimony was not protected by § 1981 because "he only provided technical, expert testimony about the

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[9] At oral argument, defendants argued that § 1981 prohibits retaliation only against an individual who attempts to vindicate the rights of someone suffering discrimination, not one who has suffered retaliation because of a previous complaint of discrimination. Defendants further argued that the Howards' complaint against Mercedes Greenway alleged only a retaliation claim under § 1981, and thus that Zastrow's testimony, even if it supported that claim, was one step removed from the scope of the statute's protection. Protection for an individual who attempts to vindicate another's contract-related right does not hinge on whether the victim of discrimination precisely affixes a § 1981 label to the deprivation of his civil rights. Further, because we find that the Howards' *pro se* complaint, liberally construed, alleges that Mercedes Greenway sold them a defective vehicle because of their race, we need not address the scope of *Humphries*.

[v]ehicle" and he "had no knowledge of any specific instances of racial discrimination against the Howards by Mercedes Greenway." This was error.

Section 1981 prohibits retaliation against an individual who has attempted to vindicate another's § 1981 rights; statutory protection is not limited only to those who have personally witnessed the alleged discriminatory conduct. Likewise, it is immaterial that Zastrow did not speculate that Mercedes Greenway discriminated against the Howards. The Howards could not prove that the dealership sold them a defective car because of their race without Zastrow's testimony that the vehicle was, in fact, defective.[10] Because Zastrow's testimony supported the Howards' § 1981 claim, it is protected under the statute. *See Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1032 (8th Cir. 2013) (holding that an employee who provided an interview in the course of an internal investigation into alleged discriminatory conduct by a supervisor was protected from retaliation under § 1981 because "someone who has substantiated a complaint of a civil rights violation has . . . acted to vindicate the rights of minorities").[11]

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[10] When asked in his deposition whether he testified in support of the Howards' racial discrimination claims, Zastrow responded that he did not. Defendants argue that this "admission" defeats Zastrow's claim this his testimony in the Howards' lawsuit was protected under § 1981. Construed in the light most favorable to Zastrow, however, his statement indicates only that he did not testify directly as to whether Mercedes Greenway discriminated against the Howards, not that he was unaware of the Howards' claims of racial discrimination.

[11] The Eighth Circuit also suggested in *Sayger* that testimony in a civil racial discrimination suit is protected activity under

Defendants also argued in the district court that Texas public policy favors freedom of contract and a company's termination of a business relationship with an expert witness who testified against it is not actionable retaliation. This is true, so long as the refusal to contract with the witness is not based on his race, or because he has attempted to vindicate another's § 1981 rights. *See Humphries*, 553 U.S. at 452-53 (holding that § 1981's protection extends to an individual who attempts to secure another's rights under the statute); *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989) (explaining that § 1981 "prohibits, when based on race, the refusal to enter into a contract with someone"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Humphries*, 553 U.S. at 450. Because Zastrow has alleged that Mercedes Greenway refused to sell him parts after he testified in support of the Howards' discrimination claims, he has stated a claim for retaliation under § 1981.

We are skeptical, however, that Zastrow can prove that defendants violated Zastrow's § 1981 rights.

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§ 1981. In *Gacek v. Owens & Minor Distribution, Inc.*, 666 F.3d 1142, 1146 (8th Cir. 2012), the Eighth Circuit left that question open. One year later in *Sayger*, the court explained that a subsequent circuit decision had held that protected activity under Title VII is also protected activity under § 1981, and Title VII makes it illegal to retaliate against an employee who has testified or participated in any manner in a proceeding under that statute. 735 F.3d at 1031. The import of this holding is that any testimony in a racial discrimination case is protected by § 1981. Because the Howards' complaint listed a myriad of non-discrimination claims, this automatic protection does not apply here. As explained above, though, participation in a case containing both discrimination and non-discrimination claims is protected if it supports any of the racial discrimination claims.

Perhaps because non-employment retaliation claims under § 1981 are exceedingly rare, none of the parties has articulated the legal framework to apply to Zastrow's claim. Section 1981 retaliation claims are evaluated under the familiar three-part test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Willis v. Cleo Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). First, to establish a prima facie case of non-employment retaliation under § 1981, a plaintiff must show that: (1) he engaged in activity protected by § 1981; (2) he was subjected to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. *See id.* at 317; *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 105 (2d Cir. 2001) (adapting prima facie elements for a non-employment retaliation claim under § 1981 from the elements of a retaliation claim under Title VII).[12] If the plaintiff establishes a prima facie case, the burden shifts to the defendant to proffer a legitimate, non-retaliatory reason for the adverse action. *See Willis*, 749 F.3d at 317-18. And if the defendant provides such an explanation, the burden returns to the plaintiff to show that the proffered reason was pretext for retaliation. *See id.* at 318.

Defendants have challenged only the first two prongs of the prima facie case, arguing (incorrectly) that Zastrow's testimony was not protected by § 1981 and that refusal to contract is not an adverse action. They have not challenged Zastrow's ability to demon-

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[12] While our circuit has provided a modified prima facie test for non-employment discrimination claims under § 1981, *see e.g.*, *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288-89 (5th Cir. 2004), it does not appear that we have explicitly done so for retaliation claims.

strate pretext. As discussed above, however, a company's refusal to contract with someone who has criticized its business and impugned its reputation is not illegal retaliation—so long as that refusal is not a reprisal for a complaint of racial discrimination or an attempt to support the complaint of another. Zastrow's testimony about the condition of the CLK was necessary to establish almost all of the Howards' claims, including those for fraud, negligence, breach of contract, and breach of warranty. If Mercedes Greenway contended that it severed its business relationship with Zastrow simply because he disparaged the dealership's products or quality of service, Zastrow would have to show that it actually did so because his testimony supported the Howards' § 1981 claims. In other words, he would have to show that, but for his testimony's relevance to the Howards' discrimination claims—his attempt to secure their § 1981 rights—the dealership would not have stopped selling him parts. *See, e.g.*, *Willis*, 749 F.3d at 317-18 (applying "but for" standard of causation to third-step pretext inquiry for § 1981 employment retaliation claim); *see also Roberts v. Lubrizol Corp.*, 582 F. App'x 455, 460-61 & n.4 (5th Cir. 2014) (per curiam) (same).

It appears to us that, in light of the general nature of his testimony and the plethora of claims in the Howards' case, it will be difficult for Zastrow to create a genuine issue of fact as to pretext. But defendants have not made any arguments related to steps two or three of the burden-shifting analysis and thus we do not decide the issue.[13] *See Gilbert v. Donahoe*, 751

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[13] Defendants stated in their district court brief that they "have not found any authority supporting the [p]laintiffs' allegations that a company deciding to sever a business relationship with

F.3d 303, 311 (5th Cir. 2014) (explaining that we may affirm a judgment on a ground not addressed by the district court only if the argument was raised below). Accordingly, we VACATE the district court's grant of summary judgment on Zastrow's § 1981 claim and REMAND the case to the district court. That court may choose to allow additional summary judgment briefing and perform the *McDonnell Douglas* analysis in the first instance.

V.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment on Zastrow's civil RICO claim and his § 1982 claim, but VACATE its judgment on Zastrow's § 1981 claim and REMAND the case for further proceedings consistent with this opinion.

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someone who testified as a paid expert witness against them is actionable as retaliation." This statement does not constitute the proffer of a non-retaliatory reason for refusing to contract with Zastrow; it is simply a recitation of the undisputed facts that Zastrow was an expert witness and that Mercedes Greenway terminated its dealings with him after he testified—it does not explain why Mercedes Greenway did so. As discussed above, if the dealership refused to sell Zastrow parts because his expert testimony supported the Howards' racial discrimination claims, its refusal to contract was illegal retaliation under § 1981; if not, it wasn't.

JUDGMENT OF THE FIFTH CIRCUIT (JUNE 12, 2015)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW HEIGHTS AUTOHAUS,

Plaintiffs-Appellants,

v.

HOUSTON AUTO IMPORTS GREENWAY LTD; d/b/a Mercedes-Benz of Houston Greenway, GEORGE A. KURISKY, JR.; JOHNSON DELUCA KURISKY & GOULD, P.C.,

Defendants-Appellees.

No. 14-20359

D.C. Docket No. 4:13-CV-574

Appeal from the United States District Court for the Southern District of Texas, Houston

Before: CLEMENT, PRADO, and ELROD, Circuit Judges.

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part, and the cause is remanded to the District Court

for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (MAY 6, 2014)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL,

Plaintiffs,

v.

HOUSTON AUTO IMPORTS GREENWAY LTD; d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL,

Defendants.

Civil Action No. 4:13-CV-574

Before: Kenneth M. HOYT,
United States District Judge.

I. Introduction

Pending before the Court are the defendants', Johnson, DeLuca, Kurisky & Gould, P.C. ("JDKG") and George A. Kurisky, Jr. (collectively, the "Attorney Defendants") and Houston Auto M. Imports, Ltd. d/b/a Mercedes-Benz of Houston Greenway ("Mercedes Greenway"), motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure

(Docket Nos. 94 and 95). The plaintiffs, Mark Zastrow and Heights Autohaus, have replied (Docket Nos. 98 and 99) and the defendants have responded (Docket Nos. 105 and 106). Having reviewed the parties' submissions, the record and the applicable law, the Court grants both motions for summary judgment in their entirety.

II. Factual Background

The relevant facts are largely undisputed. Mark Zastrow is the majority shareholder of Z-Z Interests, Inc., which operates under the assumed name "Heights Autohaus." Heights Autohaus performs service repairs on a variety of automobiles, including Mercedes-Benz vehicles. Prior to the events giving rise to this litigation, Heights Autohaus often purchased parts from Mercedes Greenway.

In September 2012, Zastrow was retained to conduct an inspection on a 2006 Mercedes Benz CLK (the "Vehicle") that Mercedes Greenway had sold to Jesse C. Howard and JoAnn Jefferson-Howard (collectively, the "Howards"). The Howards were suing Mercedes Greenway in connection with their purchase of the vehicle. Reginald E. McKamie, Sr. represented the Howards and is also representing the plaintiffs in this matter. The Attorney Defendants represented Mercedes Greenway. The causes of action in that complaint included claims of racial discrimination, violation of the Texas Deceptive Trade Practices Act, negligence, breach of contract, and breach of warranty. The case was eventually submitted to arbitration.

Zastrow inspected the Vehicle and was scheduled to give deposition testimony concerning his findings on January 8, 2013. The day prior to his scheduled

deposition, Zastrow received a phone call from Mercedes Greenway. Zastrow claims that Mercedes Greenway told him things would go badly for him if he testified. Nevertheless, Zastrow appeared for his deposition and testified about his inspection of the Vehicle and gave his opinions regarding the repairs that had been performed on it. The day after he was deposed, Zastrow received another call from Mercedes Greenway and was informed that the company would no longer sell parts to him.

The following week, the final arbitration hearing was conducted for the Howards' claim. It began on January 14 and concluded on January 17. Zastrow did not testify during the arbitration hearing and was unaware it was even taking place. On January 14, the Attorney Defendants sent a letter to Zastrow on behalf of its client, Mercedes Greenway, formally informing him that the company was terminating its business relationship with him.

Less than a week after the hearing concluded, McKamie sent the Arbitrator a Notice of Retaliation Against Witness in Discrimination Suit and Intent to Sue (the "Notice"). The Notice referenced some the previously discussed correspondence between Mercedes Greenway and Zastrow. On February 27, 2013, the Arbitrator issued the Award of Arbitrator, and shortly thereafter the plaintiffs filed this suit.

The plaintiffs assert the following causes of actions against the defendants: (1) conspiracy in violation of 18 U.S.C. § 1503; (2) engagement in a pattern of racketeering in violation of 18 U.S.C. § 1962(c); and (3) retaliation in violation of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, and

42 U.S.C. §§ 1981 and 1982. The defendants seek summary judgment on all claims.

III. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment against a party who fails to make a sufficient showing of the existence of an element essential to the party's case and on which that party bears the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323; *see also Martinez v. Schlumber, Ltd.*, 338 F.3d 407, 411 (5th Cir. 2003). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

If the movant meets its burden, the burden then shifts to the nonmovant to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995); *Little*, 37 F.3d at 1075). "To meet this burden, the non-movant must 'identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s].'" *Id.* (quoting *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)). It may not satisfy its burden "with some

metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Little*, 37 F.3d at 1075 (internal quotation marks and citations omitted). Instead, it "must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *American Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Intern.*, 343 F.3d 401, 405 (5th Cir. 2003) (citing *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998)).

"A fact is material only if its resolution would affect the outcome of the action . . . and an issue is genuine only 'if the evidence is sufficient for a reasonable jury to return a verdict for the [nonmovant].'" *Wiley v. State Farm Fire and Cas. Co.*, 585 F.3d 206, 210 (5th Cir. 2009) (internal citations omitted). When determining whether a genuine issue of material fact has been established, a reviewing court is required to construe "all facts and inferences . . . in the light most favorable to the [nonmovant]." *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005) (citing *Armstrong v. Am. Home Shield Corp.*, 333 F.3d 566, 568 (5th Cir. 2003)). Likewise, all "factual [are to be resolved] in favor of the [nonmovant], but only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory *facts." Boudreaux*, 402 F.3d at 540 (citing *Little*, 37 F.3d at 1075 (emphasis omitted)). Nonetheless, a reviewing court is not permitted to "weigh the evidence or evaluate the credibility of witnesses." *Boudreaux*, 402 F.3d at 540 (quoting *Morris*, 144 F.3d at 380). Thus, "[t]he appropriate inquiry [on summary judgment] is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

one party must prevail as a matter of law.'" *Septimus v. Univ. of Hous.*, 399 F.3d 601, 609 (5th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, (1986)).

IV. Analysis and Discussion

A. Conspiracy and 18 U.S.C. § 1503 Claims

The plaintiffs allege that the defendants conspired to engage in unlawful acts of obstruction and impeding or influencing the due administration of justice in violation of 18 U.S.C. § 1503. The plaintiffs' cause of action fails for two reasons.

First, section 1503 is a criminal statute that does not provide a private right of action. *See Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960) (holding that various sections of Title 18 U.S.C., including section 1503, are "criminal in nature and provide no civil remedies"). "It is well established that criminal statutes do not provide a basis for liability in a civil action such as this one." *Thornton v. Merchant*, 2011 WL 147929, *13 (S.D. Tex. Jan. 18, 2011) (Atlas, J.) (citing *Hanna*, 281 F.2d at 303).

Second, the plaintiffs have not properly alleged a conspiracy. It is axiomatic that a combination of two or more persons is required to form a conspiracy. *See Chon Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). It is equally well-settled that an agent cannot conspire with its principal. *See Bradford v. Vento*, 48 S.W.3d 749, 761 (Tex. 2001). An attorney or law firm performing traditional legal services for a client is acting as an agent of the client. *See In re George*, 28 S.W.3d 511, 516 (Tex. 2000). As such, the Court grants the defendants summary judgment on these claims.

B. RICO Claim

Any person injured in his business or property by reason of a violation of 18 U.S.C. § 1962(c) can bring a civil cause of action. 18 U.S.C. § 1964(c). To prove a violation of section 1962(c), a plaintiff must establish three elements: "(1) a persons[1] who engages in (2) a pattern of racketeering activity[2] (3) connected to the acquisition, establishment, conduct, or control of an enterprise[3]." *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (quoting *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988)) (emphasis omitted, footnotes added). The person who engages in the racketeering activity must be distinct from the enterprise, and the enterprise must be distinct from the series of predicate acts that constitute the racketeering activity. *Id.*

The plaintiffs' RICO claim fails because they have neither alleged an enterprise nor presented facts demonstrating the existence of an enterprise. A "necessary requirement to a RICO claim is the proper allegation by the [p]laintiff of the existence of an enterprise." *Manax v. McNamara*, 660 F. Supp. 657, 662 (W.D. Tex. 1987) (citing 18 U.S.C. § 1962(c)); *see*

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[1] A "person" is an individual or entity capable of holding a legal or beneficial interest in property. *See Whelan v. Winchester Production Co.*, 319 F.3d 225, 229 n.3 (5th Cir. 2003).

[2] "Racketeering activity" is any of the predicate acts defined in 18 U.S.C. § 1961(1), which includes actions relating to obstruction of justice.

[3] An "enterprise" is "a group of persons or entities associating together for the common purpose of engaging in a course of conduct." *Whalen*, 319 F.3d at 229 (citing *United States v. Turkette*, 425 U.S. 576, 583 (1981)).

also Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985). The plaintiffs did not allege the existence of an enterprise in their complaint (Docket No. 1, ¶ 15). In fact, the plaintiffs have not identified a RICO enterprise in any document filed with the Court in connection with this litigation.[4] That deficiency is fatal to the plaintiffs' RICO claim.

C. 42 U.S.C. §§ 1981 and 1982 Claims

The plaintiffs allege that the defendants retaliated against them in violation of 42 U.S.C. §§ 1981 and 1982. The defendants argue that Zastrow has not properly stated a claim under either statute because he did not come forward to complain about a violation of the Howards' rights under the acts and he did not testify in support of the Howards' discrimination claims. The plaintiffs did not respond to this argument.

Section 1981, which prohibits racial discrimination in making and enforcing contracts, also prohibits retaliation. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). Section 1982 similarly prohibits racial discrimination and retaliation, but focuses on rights related to the acquisition and ownership of property. *Id.* at 452. The statutes are interpreted similarly because of their shared language, history and purposes. *Id.* at 448.

In *Humphries*, the Court held that a cause of action exists for "an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights." *Id.* In this case, however, Zastrow

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[4] The Court does not imply that alleging the RICO enterprise in a filing other than the complaint would have cured this defect.

admits that when he was deposed for the Howards' arbitration, he only provided technical, expert testimony about the Vehicle. He gave no testimony in support of their claim of racial discrimination. In fact, prior to the deposition, Zastrow had no knowledge of any specific instances of racial discrimination against the Howards by Mercedes Greenway. Because Zastrow was not helping the Howards "secure [their] § 1981 [or § 1982] rights," his claim of retaliation is not cognizable under either statute. *Id.*

D. Title VII Retaliation Claim

Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against" an employee for opposing an unlawful practice or asserting a charge, testifying, assisting, or participating in a Title VII proceeding or investigation. *Burlington Northern*, 548 U.S. at 59 (citing 42 U.S.C. § 2000e-3(a)); *see also Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414 (5th Cir. 2003). It is undisputed that Zastrow was not employed by any of the defendants when he participated in the Howards' purported Title VII proceeding. Accordingly, no action can be maintained under Title VII.

V. Conclusion

Based on the foregoing discussion, the Court GRANTS the defendants' motions for summary judgment.

It is so ORDERED.

SIGNED on this 6th day of May, 2014.

/s/ Kenneth M. Hoyt
United States District Judge

FINAL JUDGMENT OF THE DISTRICT COURT (MAY 6, 2014)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL,

Plaintiffs,

v.

HOUSTON AUTO IMPORTS GREENWAY LTD; d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL,

Defendants.

Civil Action No. 4:13-CV-574

Before: Kenneth M. HOYT,
United States District Judge.

Pursuant to the Memorandum Opinion and Order entered in this case, the Court GRANTS the defendants', Johnson, DeLuca, Kurisky & Gould, P.C., George A. Kurisky, Jr., and Houston Auto M. Imports, Ltd. d/b/a Mercedes-Benz of Houston, motions for summary judgment. The plaintiffs shall take nothing on their claims.

This is a Final Judgment.

SIGNED on this 6th day of May, 2014.

/s/ Kenneth M. Hoyt
United States District Judge

ORDER OF FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 5, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ZASTROW HEIGHTS AUTOHAUS,

Plaintiffs-Appellants,

v.

HOUSTON AUTO IMPORTS GREENWAY LTD;
d/b/a Mercedes-Benz of Houston Greenway,

Defendants-Appellees.

No. 17-20680

Appeal from the United States District Court
for the Southern District of Texas

Before: KING, ELROD, and HAYNES,
Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the

Petition for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ Jennifer W. Elrod
United States Circuit Judge

INSTRUCTIONS TO THE JURY (MARCH 9, 2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK ZASTROW, ET AL,

Plaintiffs,

v.

HOUSTON AUTO IMPORTS GREENWAY LTD; d/b/a MERCEDES-BENZ OF HOUSTON GREENWAY, ET AL,

Defendants.

Civil Action No. 4:13-CV-574

Before: Kenneth M. HOYT,
United States District Judge.

The following instructions were presented to the jury on the 9th day of March, 2016. Signed this 9th day of March, 2016.

/s/ Kenneth M. Hoyt
United States District Judge

I. GENERAL INSTRUCTIONS

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case. After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments.

Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions. In the verdict form that I will explain in a moment, you will be asked to answer some questions about the factual issues in this case. Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence. In other words, a preponderance of the evidence means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may consider the testimony of all witnesses, regardless of who may have called

them, and all exhibits received in evidence, regardless of who may have produced them.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial. You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness. While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

There are two types of evidence that you may consider in properly finding the truth as to the facts

in the case. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

You must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial, I sustained objections to certain questions and answers. You must disregard these questions and answers. Do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life, irrespective of position or title. The parties are equal before the law and must be treated as equals in a court of justice. Therefore, do not let bias, prejudice,

or sympathy play any part in your deliberations. Our system of law does not permit jurors to be governed by bias, prejudice, sympathy, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

II. STATEMENT OF THE CASE

The plaintiffs, Mark Zastrow and Heights Autohaus, filed this Civil Rights suit against the defendants, Houston Auto Imports Greenway, LTD d/b/a Mercedes-Benz of Houston Greenway when the defendants terminated the business relationship between the plaintiffs and the defendants based on allegations of retaliation in violation of 42 U.S.C. § 1981. The defendants deny that they retaliated against the plaintiffs. Instead, the defendants claim that they terminated the business relationship with the plaintiffs because of the plaintiffs' disparaging and inflammatory remarks uttered at his deposition during an arbitration proceeding between the defendants and Jesse Howard and Joann Jefferson-Howard (collectively, the Howards). The Howards alleged in their suit against the defendants that the defendants violated federal law by discriminating against them in the manner and means that the defendant provided or failed and refused to provide repair services to their vehicle.

Zastrow claims that before he gave his deposition testimony in the Howards' arbitration proceeding, he was called by Nathan De Los Santos, an employee of the defendants, and warned not to give testimony in the arbitration proceeding. When he failed to heed

the alleged warning and gave testimony, the defendants terminated its business relationship with the plaintiffs.

III. 42 U.S.C. § 1981 CLAIM

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . including the making, performance, modification, and termination of contracts [without fear of] retaliation.

Section 42 U.S.C. § 1981 prohibits retaliation against an individual or entity, like the plaintiffs, who assists a different individual, like the Howards, in attempting to enforce their rights under § 1981.

To establish his § 1981 claim, the plaintiff must establish by a preponderance of the evidence that: (1) he engaged in activity (the giving of a deposition in support of the Howards) that was protected by § 1981; (2) he was subjected to an adverse action (termination of the business relationship); and (3) a causal link exists between the protected activity (the giving of a deposition) and the termination of the business relationship.

A company's refusal to contract with someone whom it claims criticized its business practices and impugned its reputation is not illegal retaliation so long as that refusal to contract is not a reprisal for an attempt to support the civil rights complaint of another. The plaintiffs must show that the defendants discontinued its relationship with the plaintiffs because Zastrow's testimony supported the Howard's § 1981 claims. In other words, but for his testimony in support of the Howard's discrimination claim, the defendants would not have stopped selling the plaintiffs auto parts.

IV. DAMAGES

I am now going to instruct you on the issue of damages. The fact that I am giving you instructions concerning the issue of the plaintiffs' damages does not mean that I believe that the plaintiffs should, or should not, prevail in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of the plaintiffs based on a preponderance of the evidence in accordance with the other instructions I have given you.

You should only consider calculating damages if you first find that the defendants violated 42 U.S.C. § 1981 and that the violation caused injury to the plaintiffs. If you find that the defendants violated 42 U.S.C. § 1981, then you must determine whether it has caused the plaintiffs damages and, if so, you must determine the amount of those damages. You should not conclude from the fact that I am instructing you on damages that I have any opinion as to whether the plaintiffs has proved liability on the part of the defendants.

The plaintiffs must prove their damages by a preponderance of the evidence. Your award must be based on evidence and not on speculation or guesswork. On the other hand, the plaintiffs need not prove the amount of their losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.

If you find from a preponderance of the evidence that the plaintiff sustained a technical violation of his § 1981 right, but that the plaintiff suffered no actual loss as a result of this violation, then you may award the plaintiff nominal damages.

V. COMPENSATORY DAMAGES

If you find that the defendants are liable to the plaintiffs, then you must determine an amount that is fair compensation for all of the plaintiffs' damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiffs whole—that is, to compensate the plaintiffs for the damage that the plaintiffs have suffered. Compensatory damages are not limited to expenses that the plaintiffs may have incurred because of their injury. If the plaintiffs win, they are entitled to compensatory damages for mental anguish, shock and discomfort that they have suffered because of the defendants' conduct. The term "mental anguish" implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these.

You may award compensatory damages only for injuries that the plaintiffs prove were proximately caused by the defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiffs' damages, no more and no less. You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiffs have actually suffered.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiffs prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

VI. JURY DELIBERATIONS

It is your duty as jurors to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself; but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do, not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

When you retire to the jury room you may take this charge with you as well as exhibits, which the Court has admitted into evidence. You should first select one of your number to act as your Foreperson who will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience.

You will be asked to return your verdict in this case in the form of answers to a series of questions. In answering the questions on the verdict form, you are again instructed that you are to make your findings in accordance with the preponderance of evidence in this case, and the law as given to you in these instructions. Of course, you are to consider all of my instructions as a whole and not single out any particular instruction.

After you have reached your unanimous verdict, your Foreperson is to fill in the verdict form with your answers to the questions concerning the fact issues in this case, date the form, sign it, and then return to the courtroom.

If you recess during your deliberations, follow all of the instructions that the Court has given you regarding your conduct during the trial.

If, during your deliberations, you should want to communicate with me at any time, please give a written message or question to the Marshal, who will bring it to me. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. You must never disclose to anyone, not even to me, your numerical division on any question.

After the verdict, you are not required to talk with anyone about the case unless the Court orders otherwise. The lawyers may wish to talk to you after the case is over. You are free to do so or not, as you wish.

VII. INTERROGATORIES

INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that the defendants retaliated against the plaintiffs because Zastrow

gave testimony in supported the Howard's claims under § 1981? Answer "Yes" or "No."

Answer: Yes

If you answered "Yes" to INTERROGATORY NUMBER 1, then answer INTERROGATORY NUMBER 2; otherwise do not answer INTERROGATORY NUMBER 2.

INTERROGATORY NO. 2: What damages, if any, do you find the plaintiffs suffered as a result of the defendants' retaliatory conduct? Answer in dollars and cents, if any.

Answer: a) economic damages $939.29
b) mental anguish $0

INTERROGATORY NO. 3: Do you find from a preponderance of the evidence that the defendant, Houston Auto Imports Greenway, LTD d/b/a Mercedes-Benz of Houston Greenway, acted with malicious or reckless intent? Answer "Yes" or "No."

Answer: No

In answering Interrogatory Number 3, you are instructed:

The plaintiffs claim the acts of the defendants were done with malice or reckless indifference to the plaintiffs federally protected rights and that as a result there should be an award of punitive damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. An award of punitive damages is permissible against the defendants in this

case only if you find by clear and convincing evidence that the defendants acted with malice or reckless indifference to the plaintiffs' federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

Clear and convincing evidence: Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the truth of the matter sought to be established. It is evidence so clear, direct, weighty and convincing as to enable you to come to a clear conviction without hesitancy.

ANSWER: No

If you answered "Yes" to INTERROGATORY NUMBER 3, then answer INTERROGATORY NUMBER 4; otherwise do not answer INTERROGATORY NUMBER 4.

INTERROGATORY NO. 4: What sum of money, if any, do you award to the plaintiffs as punitive damages for the defendant's malicious or reckless conduct, if any, you have found? Answer in dollars and cents, if any.

ANSWER: $0